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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON KENDALL DAVIS,

Defendant and Appellant.

B288530

(Los Angeles County  
Super. Ct. No. YA094068)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Modified and, as so modified, affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

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While under the influence of PCP, defendant and appellant Jason Kendall Davis crashed his truck into another vehicle, killing the driver and seriously injuring a passenger. A jury convicted Davis of second degree murder, gross vehicular manslaughter while intoxicated, and two counts of driving under the influence (DUI) while intoxicated within 10 years of two other DUI offenses. Davis's sole contention on appeal is that one of the two DUI convictions must be stricken, because he committed only a single act of driving under the influence and can therefore be convicted of only one DUI count. This contention has merit. Accordingly, we vacate one of the DUI convictions and the stayed sentence attached to it. In all other respects, we affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

##### 1. *Facts*

The evidence relevant to the issue presented on appeal may be succinctly summarized. On the evening of April 19, 2016, while under the influence of PCP, Davis drove his Toyota Sequoia at a high rate of speed on Crenshaw Boulevard in Los Angeles. He crossed over the center divider, drove into oncoming traffic, and crashed head-on into a Nissan Maxima being driven by Michael Ray Greer. Greer was killed in the collision. Greer's wife, Ana Liza, who was seated in the Nissan's front passenger seat, sustained serious injuries.

Davis had suffered five prior convictions for driving under the influence. At the time of the fatal accident, he was on DUI probation. On three occasions before the 2016 crash, he was told he could be charged with murder if he killed someone while driving under the influence. He had completed an 18-month long

substance abuse treatment program, which included classes, group sessions, and individual counseling.

## *2. Procedure*

A jury convicted Davis of second degree murder (Pen. Code, § 187, subd. (a), count 1);<sup>1</sup> gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a), count 2); and two counts of driving under the influence, causing great bodily injury, within 10 years of two other DUI offenses (Veh. Code, §§ 23153, former subd. (e), 23566, subd. (b), counts 3 and 4). The jury further concluded, as to counts 2 through 4, that Davis proximately caused great bodily injury or death to more than one victim. The trial court sentenced Davis to 15 years to life in prison on count 1, murder, and a consecutive four-year term on count 4, DUI. The court stayed sentence on counts 2 and 3 pursuant to section 654. It imposed a restitution fine, a suspended parole revocation restitution fine, a criminal conviction assessment, and a court security fee. Davis timely appealed the judgment.

## DISCUSSION

Davis contends his conviction for one of the DUI offenses, count 3, must be stricken, because a defendant cannot be convicted of two counts of DUI based upon a single act of driving. The People concede the point, and we agree.

Vehicle Code section 23153, subdivision (f) (formerly subdivision (e))<sup>2</sup> provides: “It is unlawful for a person, while

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<sup>1</sup> All further undesignated statutory references are to the Penal Code.

<sup>2</sup> In 2016, Vehicle Code section 23153, subdivision (e) was redesignated, without substantive change, as subdivision (f). (Stats. 2016, ch. 765, § 2.)

under the influence of any drug, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.”

Our California Supreme Court has held that “a defendant cannot be charged with multiple counts of felony drunk driving under Vehicle Code section 23153, subdivision (a), where injuries to several people result from one act of drunk driving.” (*People v. McFarland* (1989) 47 Cal.3d 798, 802; *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353.) *Wilkoff* explained that a “charge of multiple counts of violating a statute is appropriate only where the actus reus prohibited by the statute—the gravamen of the offense—has been committed more than once. The act prohibited by [Vehicle Code] section 23153 is the act of driving a vehicle while intoxicated and, when so driving, violating any law relating to the driving of a vehicle.” (*Wilkoff v. Superior Court*, at p. 349.) The court’s holding in *Wilkoff* was “based upon the express language of the statute, which defines the offense principally in terms of driving while intoxicated rather than the injuries which result therefrom, as well as evidence that the Legislature clearly intended only one violation of the statute regardless of the number of victims.” (*People v. McFarland*, at p. 802; *Wilkoff v. Superior Court*, at pp. 352–353.) The legislative intent, *Wilkoff* concluded, was “that one instance of driving under the influence which causes injury to several persons is chargeable as only one count of driving under the influence.” (*Wilkoff v. Superior Court*, at p. 353; *People v. McFarland*, at p. 802; see also *People v. Walker* (2014) 231 Cal.App.4th 1270, 1276; *People v. Subramani* (1985) 173 Cal.App.3d 1106, 1110.)

Subdivision (a) of Vehicle Code section 23153 is identical to former subdivision (e) (now subdivision (f)), the subdivision at issue here, except that subdivision (f) pertains to driving under the influence of “any drug,” whereas subdivision (a) pertains to driving under the influence of “any alcoholic beverage.” It is undisputed the evidence showed Davis engaged in but a single act of driving under the influence, which resulted in the fatal collision. Accordingly, Davis can be convicted of only one count of DUI pursuant to Vehicle Code section 23153, former subdivision (e), and one of the multiple convictions must be vacated. (*People v. Walker, supra*, 231 Cal.App.4th at pp. 1276–1277.) Davis’s other convictions, for second degree murder, gross vehicular manslaughter, and one of the DUI convictions, remain valid.

### DISPOSITION

The judgment is ordered modified by vacating the conviction and the stayed sentenced on count 3, violation of Vehicle Code section 23153. The clerk of the superior court is directed to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed in all other respects.

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EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.